Mt. Sinai Hospital *and* 1199, National Health and Human Service Employees Union. Case 2–CA–28197

July 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On September 18, 1997, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mt. Sinai Hospital, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In rejecting the Respondent's argument that the Union waived its right to bargain over the January 1995 removal of sous chefs from the unit to the assistant culinary manager (ACM) position, we apply the well-settled "clear and unmistakable" standard. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). However, even under the "contract coverage" test applied by our concurring colleague, we would reach the same result.

We further agree with the judge that Respondent's unilateral action constituted a change in the scope of the unit. As the Board stated in *Holy Cross Hospital*, 319 NLRB 1361 (1995), once a position has been included within the scope of the unit, the employer cannot remove it without the consent of the union or the Board. Here, the parties agreed to arbitrate the unit status of the sous chefs, and the arbitrator placed them in the unit. The Respondent effectively removed the position of sous chef from the unit when it reclassified the three employees who occupied the position but continued to have them do the same work. Moreover, the unit sous chef position, that the Respondent subsequently posted was substantially altered. Thus, the Respondent violated Sec. 8(a)(5) of the Act by reclassifying the position in order to remove it from the unit. There is no dispute that the Respondent never consulted with the Union and that the Union never agreed in the contract to the alteration.

Finally, we agree with the judge's alternative rationale—and the one on which our concurring colleague relies, that even were the Respondent's unilateral change to constitute a transfer of unit work, rather than an alteration of the unit, the Respondent violated Sec. 8(a)(5) because there had been no agreement, impasse, or waiver.

MEMBER HURTGEN, concurring in part.

I agree with my colleagues and the judge that the Respondent violated Section 8(a)(5) by refusing to provide the Union with requested information and by unilaterally reclassifying the sous chefs as assistant culinary managers (ACMs). With respect to the latter 8(a)(5) violation, however, I find it unlawful only as a unilateral transfer of unit work.

I agree with my colleagues that the sous chefs were unit employees prior to Respondent's action. I assume arguendo, as did the judge, that the new ACM position was a supervisory one. In my view, an employer does not have to bargain about the creation of a supervisory position. Nor does an employer have to bargain about the filling of that supervisory position. However, where, as here, a unit employee is selected for the supervisory position, and the promoted employee takes with him some of his unit work, the employer must bargain about that removal of work from the unit.[1] That is the situation here. Indeed, Respondent's ACMs spend most of their time performing unit work. Thus, Respondent's unilateral removal of unit work was unlawful.

The judge and my colleagues rejected the Respondent's waiver defense under the "clear and unmistakable waiver" analysis of *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In my view, the "contract coverage" analysis, set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993), rather than "clear and unmistakable waiver" analysis, is the appropriate test to determine whether the Respondent was obligated to bargain. As I have said elsewhere, where a contract clause is offered as a defense, our task is simply to interpret the language of that clause.[2]

Here, the management rights clause provides that the Respondent retains the exclusive right to "discontinue, reorganize or combine any operation even if the effect is a reduction in unit work or in the number of unit employees." In my view, the decision to transfer work out of the unit does not fall within this language. Therefore, under a "contract coverage" analysis, the Respondent was not privileged to act unilaterally.

Nor do I find a privilege based on the Union's failure to secure a contract provision limiting performance of unit work by supervisors. The Respondent argues that during 1992 contract negotiations, the Union proposed language addressing its concern that, by creating new nonunit positions to perform unit work, the Respondent was eroding the bargaining unit. The Union's proposal was not adopted. However, the parties agreed to maintain the status quo, i.e., the Union would continue to challenge the Respondent's efforts to allow supervisors to perform unit work. The parties agreed to monitoring provisions, and an expedited me-

[1] *Legal Aid Bureau*, 319 NLRB 159 (1995).

[2] *Central Illinois Public Service Co.*, 326 NLRB 928, 943 fn. 23 (1998); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999).

diation/arbitration procedure. In addition, the parties agreed to treat the 1992 discussions on this subject as "nonprecedential." That is, they expressly agreed that neither would use statements or proposals made during negotiations against the other in any future proceedings, including arbitrations and NLRB proceedings. Based on the above, bargaining history does not establish a Respondent privilege.

Finally, I agree with the judge that an employer privilege may not be inferred from the 1992 adoption of monitoring and enforcement provisions. These provisions merely established a procedure for investigating claims of erosion of the bargaining unit. These provisions cannot be construed as the grant of a privilege to refuse to bargain about the transfer of work out of the unit.

I reject the Respondent's defense that the Board should "*Collyerize*" this case, i.e., send the parties to the arbitrator for him to determine whether Respondent was privileged to transfer the unit work. Concededly, as discussed above, the dispute turns on the meaning of the contract. However, Respondent unlawfully refused to supply information relevant to that dispute. Under Board law, a refusal to supply information is not subject to *Collyer* deferral.[3] And, in the instant case, that information was inextricably related to the matter on which deferral is sought (the transfer of unit work). Where, as here, an employer unlawfully refuses to provide information relevant to a potential grievance concerning transfer of work, I would not find merit to an employer argument that the case should be deferred to grievance-arbitration.

In sum, I would not "*Collyerize*" this case, and I would find that the Respondent was not privileged to refuse to bargain over the transfer of work.

In view of the limited nature of the violation that I would find, the remedy that I would impose would permit Respondent to retain the supervisory positions and to retain the persons occupying those positions. However, the Respondent would have to return the unit work back to the unit, bargain about any future removal, and supply the relevant information.

Nancy K. Reibstein and *Susannah Z. Ringel, Esqs.,* for the General Counsel.

David R. Marshall and *Michael Davis, Esqs.,* of New York, New York, for the Respondent.

Sherri Levine and *Daniel J. Ratner, Esqs.,* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in New York, New York, on various dates between February 24 and April 4, 1997. The charge was filed by 1199, National Health and Human Service Employees Union (the Union), on February 15, 1995, and amended on June 12, 1995.[1] The complaint issued August 8, 1996.

The complaint, as amended at the hearing, alleges that Mt. Sinai Hospital (Respondent) violated Section 8(a)(5) and (1) of the Act by, unilaterally and/or without the Union's consent, bestowing supervisory authority upon a sous chef position that had been included in the bargaining unit by an arbitrator and reclassifying the position as "assistant culinary manager" in order to remove the position from the unit. The complaint further characterized Respondent's conduct as an attempt to erode the bargaining unit. Finally, the complaint alleges that Respondent failed and refused to furnish the Union, upon request, with information regarding the disputed classification. Respondent, in its answer, denied the specific allegations in the complaint and raised several affirmative defenses based upon the 10(b) statute of limitations, waiver, and deferral to arbitration.

Respondent filed a motion for deferral to arbitration on February 21, 1997, several days before the hearing opened. This motion was opposed by the General Counsel and the Charging Party. At the outset of the hearing, I denied the motion as an untimely filed Motion for Summary Judgment to the extent it sought dismissal of the complaint. I advised the parties that I would defer ruling on the deferral request in the motion until after I had heard evidence and received briefs from the parties. The deferral issue will be addressed infra.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a hospital at its facility in New York, New York, where it annually derives revenues in excess of $1 million and purchases and receives goods and supplies valued in excess of $5000 directly from points outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Respondent is a member of the League of Voluntary Hospitals and Homes of New York (the League). The League acts as the collective-bargaining agent for its members in negotiations with the Union for various bargaining units. As a member, Respondent is party to a collective-bargaining agreement with the Union covering a unit of service and maintenance employees, which is the unit pertinent here. The agreement in effect at the time of the events in dispute was effective for the period July 1, 1992, through June 30, 1995. On September 17, 1994, the League and the Union signed a memorandum agreement extending the 1992–1995 collective-bargaining agreement through June 30, 1998, with modifications.

[3] *Postal Service*, 302 NLRB 918 (1991).

[1] All dates are in 1995 unless otherwise indicated.

[2] Respondent's unopposed motion to correct the transcript is granted and received in evidence as R. Exh. 76. GC Exh. 9 and R. Exh. 60 were inadvertently included in the record even though they were neither offered nor received. I have stricken them from the record.

There is no dispute that, in about June 1993, Respondent opened a new unit called the 11 west private unit. This unit was created to provide private-paying patients with accommodations and services equivalent to that available in a four-star hotel, including gourmet meals on demand for the patient and guests. Respondent created several new positions to staff this unit because the type and quality of services provided to patients were intended to be significantly different than those provided to patients in the remainder of the hospital. In addition, to ensure higher quality food service and the ability to satisfy the demands of high-paying patients, a separate kitchen was established on the unit, with its own staff. Included in the new positions created to staff the 11 west kitchen were sous chefs.

A controversy arose over the unit placement of the sous chefs, with Respondent taking the position that they were statutory supervisors and the Union arguing for their inclusion in the unit. The matter was referred to arbitration under the collective-bargaining agreement, with hearings held on June 27 and August 15, 1994. The arbitrator, Richard Adelman, issued his award on December 14, 1994, determining that the sous chefs should be in the bargaining unit and remanding the matter to the parties to negotiate the terms of employment for this position. In reaching his decision, Arbitrator Adelman specifically found that the sous chefs were not supervisors as defined in the Act. He summarized the evidence before him as follows:

> In short, the evidence demonstrates that the sous chefs who work in the kitchen on 11 West spend at least 90% of their work time performing bargaining unit functions, and although they may perform occasional supervisory functions, these functions are either of a routine nature that do not require the exercise of any independent judgment, or, at the time of the hearing, these functions have been performed too sporadically or infrequently by the sous chefs to provide a basis for concluding that the sous chefs on 11 West are supervisors. Rather, the sous chefs work as lead persons in the kitchen, and, as such, are employees who should be in the unit.

Earlier in his decision, Arbitrator Adelman rejected the Union's contention that the unit status of the sous chefs must be determined as of the date 11 west opened and that, once established as a unit position, could not be altered during the term of the agreement. In discussing this contention, Arbitrator Adelman interpreted the contract as permitting Respondent to exclude the position during the term of the contract, even if the position started out as an employee, if the employee thereafter began to perform functions that would give the position supervisory status. According to the arbitrator: "[T]here is no contractual or statutory provision which prevents the Hospital from excluding supervisors at the point that such employees attain supervisory status." It is Respondent's actions in response to Arbitrator Adelman's award which form the basis of the complaint's allegations.

There is no dispute that a meeting was held on January 19, for the ostensible purpose of negotiating the wage rate for the newly included unit sous chef position. There is also no dispute that Respondent's director of labor relations, Glenn Courounis, informed the Union for the first time at this meeting that the three individuals who held the sous chef position at the time of the arbitrator's award now occupied a new nonunit position called assistant culinary manager (ACM) and that Respondent would post one unit sous chef position. Courounis quoted a salary for the new unit sous chef of $536/week. There is a dispute whether this was merely a proposal for the Union to consider. There is also a dispute as to whether the Union's representative, Estela Vazquez, requested any information from Respondent and whether Respondent provided any information during this meeting.

Based on these rather simple facts, a host of issues have been raised by the pleadings and the parties' positions stated at the hearing. Specifically, I must determine:

1. Whether the allegations of the complaint are time barred under Section 10(b) of the Act because the sous chef position was created in May 1993.

2. Whether the Board should defer to Arbitrator Adelman's award pursuant to *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955), and if so, whether that award permits the actions Respondent took.

3. Whether the Board should defer the dispute regarding the January 1995 change of incumbent sous chefs to ACMs to the contractual grievance/arbitration procedures under *Collyer Insulated Wire,* 192 NLRB 837 (1971).

4. Whether the sous chef and/or ACM positions were statutory supervisors.

5. Whether Respondent had any obligation under Section 8(a)(5) and (d) of the Act to notify and bargain with the Union before taking the action it did in January 1995.

6. Whether the Union waived any right it had to bargain about this matter through contract language or bargaining history.

7. Whether the Union requested and Respondent failed to provide any relevant and necessary information at the January 19, 1995 meeting.

8. If the Union requested such information, whether the Union waived any statutory right it had to the information by agreeing to a contract provision requiring Respondent to regularly disclose information regarding nonunit positions.

In addition, numerous procedural and evidentiary issues were raised in the course of the hearing and ruled upon at that time. To the extent these rulings are still in contention, I reaffirm my rulings made at the hearing.[3]

Finally, while every apparent or nonapparent conflict in the evidence may not have been specifically resolved here, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is hereby discredited.

B. Section 10(b)

Respondent argues that the sous chefs have been supervisors since the position was created in 1993 and that no change in their

[3] At the hearing, I rejected the Charging Party's attempt to exclude evidence as to the supervisory status of sous chefs during the period prior to Arbitrator Adelman's award under the theory that the arbitrator's decision was the "law of the case." In the absence of deferral, the arbitrator's decision is not binding on the Board. See *J. R. Simplot Co.,* 311 NLRB 572, 573 fn. 9 (1993). The Charging Party also sought to exclude evidence regarding collective-bargaining negotiations in 1992 based on a purported agreement between the League and the Union that neither party could use statements and demands made in those negotiations as evidence in any forum, including NLRB proceedings. Such an agreement is also not binding on the Board, assuming arguendo, that there was an agreement. I also limited admission of evidence regarding supervisory status to the period from creation of the sous chef position through calendar year 1995 in order to avoid undue delay and waste of time (see Fed.R.Evid. 403). Because the record contains ample evidence of the sous chef/ACM's duties and responsibilities prior to 1996, receipt of evidence beyond that point would be cumulative and have protracted the litigation unreasonably.

duties and responsibilities occurred in January 1995. In support of this argument, Respondent's counsel took the position that the only thing that happened in January 1995 was a change in title. Under this view of the case, any obligation Respondent had to bargain would have arisen in 1993, more than 6 months before the instant charge was filed. The General Counsel argues that the complaint's allegations are based solely on Respondent's actions in January 1995, after issuance of Arbitrator Adelman's award, and that the underlying charge was filed within 6 months of these events.

Although Respondent is correct that any allegation that Respondent refused to bargain with the Union about the creation of the sous chef position is barred by Section 10(b) of the Act, the complaint before me contains no such allegation and I will make no finding as to the lawfulness of Respondent's actions in 1993. Rather, the issues before me, as alleged in the complaint, are whether Respondent's promotion and/or reclassification of the individuals occupying the position of sous chef in December 1994 to ACMs in January 1995 violated Section 8(a)(5) and whether any information requested by the Union was unlawfully withheld in January 1995. I note that Respondent's own witnesses, Courounis, Hogarty, and former Executive Chef Cynthia Narduli, conceded that a change did occur in January 1995 beyond a mere change in title and that this change was specifically for the purpose of addressing the arbitrator's award. Thus, Section 10(b) does not bar consideration of this conduct as a potential unfair labor practice.

C. Deferral

1. *Spielberg* deferral

As noted above, the parties have already submitted their dispute over the unit placement of sous chefs to arbitration, which resulted in the December 1994 award from Arbitrator Adelman. Although it is Respondent who formally moved for deferral to that award pursuant to *Spielberg Mfg. Co.,* supra, and *Olin Corp.,* 268 NLRB 573 (1984), the General Counsel and the Charging Party essentially seek the same result, for different reasons, when they argue that Arbitrator Adelman's finding that sous chefs are not supervisors is the "law of the case."

Under the policy announced in *Spielberg* and *Olin,* the Board will defer to an arbitration decision when (1) the arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound by the results of arbitration, (3) the arbitrator has considered the unfair labor practice issues, and (4) the arbitrator's decision is not clearly repugnant to the policies and purposes of the Act. The Board has held that the party seeking to have the Board ignore the determination of the arbitrator has the burden to show that the standards for deferral have not been met. *Olin,* supra at 573–574. On the other hand, the Board has held that it will not defer to arbitration those issues which fall within the scope of its primary jurisdiction, i.e., determinations of questions concerning representation, accretion and appropriate unit. *Marion Power Shovel,* 230 NLRB 576 (1977). Thus, it is necessary to determine what was the nature of the dispute submitted to Arbitrator Adelman for resolution.

As stated at the beginning of the arbitrator's decision, the parties agreed that the issue before him was whether the sous chefs on 11 west should be in the bargaining unit. Resolution of this issue turned solely on whether they were statutory supervisors. Thus, it is apparent that the arbitrator was not faced with a question of contract interpretation, but rather interpretation of the statute and its application to the dispute in order to determine the representational rights of a new group of employees. See *Hill-Rom Co.,* 297 NLRB 351, 357–359 (1989), enf. denied on other grounds 957 F.2d 454 (7th Cir. 1992); *Brunswick Corp.,* 254 NLRB 1120, 1121 (1981); and *Peerless Publications,* 190 NLRB 658 (1971). Cf. *St. Mary's Medical Center,* 322 NLRB 954 (1997) (the Board held that deferral to arbitrator's decision that working chef should be included in the unit was appropriate because issue before the arbitrator was whether contractual language excluding employees with 600 hours of training applied to the working chef and arbitrator determined intent of the parties was that this exclusion did not apply. The Board then decided the accretion issue itself).

The instant case is distinguishable from those relied on by Respondent where the issue was whether contractual provisions permitted unilateral action by an employer, notwithstanding any statutory bargaining obligation. Resolution of the ultimate issue in those cases did not rest solely on interpretation of the statute, but turned on contract interpretation. See, e.g., *Dennison National Co.,* 296 NLRB 169 (1989) (involving employer's elimination of a bargaining unit position); *Reichhold Chemicals,* 275 NLRB 1414 (1985) (involving promotion of unit employees to nonunit supervisory positions). In those cases, the dispute as characterized by the Board, did not involve unit placement or representation issues, but whether the employer had the contractual right to take unilateral action affecting employees' wages, hours, and terms and conditions of employment. Moreover, there was no allegation in those cases that the employer's conduct constituted an alteration in the scope of the bargaining unit. The arbitrator was thus, called on to interpret the contract to determine whether the Union had waived its right to bargain over these subjects rather than to determine whether the Union had the right to represent a disputed class of employees.

Moreover, even were I to agree with Respondent that the dispute before Arbitrator Adelman was subject to the Board's *Spielberg* and *Olin* deferral policies, I would not defer to that portion of his award on which Respondent relies, i.e., the language apparently authorizing Respondent to unilaterally remove a unit position "at the point that such employees attain supervisory status." Although the arbitrator was addressing a contention raised by the Union in this part of his decision, this discussion is nothing more than dicta, because it was not necessary to resolution of the issue before him as he and the parties themselves framed it. Arbitrator Adelman was called on to determine the unit status of the sous chefs based on the evidence before him. Having done that, it was nothing more than speculation for him to consider what rights the employer had in futuro with respect to that position.

Finally, to the extent it might be argued that this portion of the arbitration award is not dicta, deferral would nevertheless be improper. The arbitrator's opinion that "no . . . statutory provision . . . prevents the Hospital from excluding supervisors at the point that such employees attain supervisory status" is "clearly repugnant to the purposes and policies of the Act." Significantly, Arbitrator Adelman did not interpret the contract as either waiving the Union's right to bargain before such a change or as consenting to a midterm exclusion of a unit classification based on unilateral delegation of supervisory authority by the Employer. He relied solely on the exclusion of supervisors from the unit description to reach this conclusion. It is well-established Board law that once a position has been included in a bargaining unit, by Board determination or consent of the parties, an employer cannot remove the position without the consent of the Union. See *Holy Cross Hospital,* 319 NLRB 1361 (1995), and cases cited therein. Thus, Arbi-

trator Adelman's determination of Respondent's rights with regard to future treatment of the sous chefs is not "susceptible to an interpretation consistent with the Act." *Olin,* supra at 577.

Accordingly, I decline deferral to the December 1994 award of Arbitrator Adelman in all respects. It will thus, be necessary to determine de novo whether the sous chefs who were promoted and/or reclassified to ACMs in January were supervisors within the meaning of the Act when Respondent took the actions it did.

2. Collyer deferral

Respondent also argues that any dispute regarding Respondent's January actions in response to Arbitrator Adelman's award should be deferred under the Board's prearbitral deferral policies announced in *Collyer,* supra, and *United Technologies,* 268 NLRB 557 (1984). Respondent argues that the collective-bargaining agreement contains specific provisions governing the dispute regarding the ACMs, including resolution of such disputes through arbitration. Respondent further argues that Arbitrator Adelman, in remanding the case to the parties to negotiate the wage rate for the sous chefs, retained jurisdiction for 60 days to hear evidence and argument as to the appropriate remedy in the event the parties were unable to agree. Respondent contends that the Union's claims as to the ACM position is a claim of noncompliance with the award and should be referred back to the arbitrator, stating its willingness to extend the retention period under that award. The General Counsel and the Charging Party oppose prearbitral deferral on the grounds that Respondent's conduct in January also raises representation issues which the Board has historically declined to defer, that the 8(a)(5) information request allegations are not deferrable under established Board policy, and that Respondent's conduct evidences a rejection of the principles of collective bargaining.

The Board generally will defer resolution of unfair labor practice allegations to a contractual grievance/arbitration procedure where (1) the dispute arises in the context of a long and productive collective-bargaining relationship; (2) there is no claim of employer enmity to employees' exercise of protected rights; (3) the parties' collective-bargaining agreement provides for arbitration in a broad range of disputes and the arbitration clause clearly encompasses the dispute at issue; (4) the Employer has asserted its willingness to submit the dispute to arbitration; and (5) the dispute is eminently well suited to resolution by arbitration, in that the contract and its meaning lay at the center of the dispute. *Clarkson Industries,* 312 NLRB 349 (1993). Similar to its practice under *Spielberg*, the Board will not defer, under *Collyer*, disputes raising issues as to unit scope, composition and representation of employees. See *McDonnell Douglas Corp.*, 312 NLRB 373, 375 (1993), enf. denied and remanded 59 F.3d 230 (D.C. Cir. 1995); *Marion Power Shovel Co.,* supra; and *Commonwealth Gas Co.,* 218 NLRB 857 (1975). The Board also will generally not defer information request allegations to arbitration. *Clarkson Industries,* supra, and cases cited therein. Cf. *United Aircraft Corp.,* 204 NLRB 879 (1972), enfd. 525 F.2d 237 (2d Cir. 1975) (the Board deferred information request allegation to arbitration where collective-bargaining agreement specified type of information the employer was obligated to provide at step 1 of grievance procedure and the complaint raised issue whether this was a waiver of the union's right to other information).[4]

The contract's grievance/arbitration provisions (arts. XXXI and XXXII) broadly define a grievance as "a dispute or complaint arising between the parties . . . under or out of this agreement or the interpretation, application, performance, termination or any alleged breach thereof" and provides for arbitration of any such grievance which is not settled through the first three steps and through a separate mediation step (art. XXXIA) added in 1992 which is available for certain types of grievances. Moreover, the contract contains a specific procedure (art. XXVII, sec. 4), also included as a result of the 1992 negotiations, for monitoring and enforcement of the recognition and subcontracting provisions of the contract, which also provides for submission to expedited mediation and arbitration of any dispute regarding, inter alia, whether an employee in a nonunion position "below supervisor" should be covered by the contract, or whether the recognition clause is being violated. This same section of the contract also obligates Respondent to furnish certain information to the Union on a regular basis.[5] There is no dispute that the Union has arbitrated disputes about unit inclusion of disputed positions before and after the instant dispute.

Although the instant dispute may satisfy the first four criteria for prearbitral deferral under *Collyer,* it does not satisfy the fifth and final one.[6] The dispute regarding Respondent's creation of the ACM position and promotion of the three incumbent sous chefs into this new or reclassified position in January is not "eminently well-suited for resolution by arbitration" because the contract and its meaning do not lay at the center of the dispute. Thus, there is no dispute that the unit excludes "supervisors" and that if a new supervisory position is created by Respondent, it should be excluded. What is in dispute is whether the sous chefs were "supervisors" in January when Respondent took the actions it did and whether, if they were not, did they become supervisors as a result of the changes implemented at that time. Resolution of this dispute does not require interpretation of any provision of the contract. Rather, it requires interpretation and application of the statutory definition of "supervisor." Resolution of this dispute will determine the composition of the unit and the representational rights of those individuals occupying the disputed position. The dispute here thus falls within those which the Board has historically declined to defer.

Moreover, in light of more recent case law, I conclude that the information request allegations are not deferrable. Because these allegations are "intimately connected" with the other allegations of the complaint, the whole case is not deferrable. *Postal Service,* 302 NLRB 918 (1991). Cf. *Clarkson Industries,* supra at 353 fn. 21.

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[4] It is unclear whether this decision is still good law in light of the Board's later decisions in *Postal Service,* 280 NLRB 685, fn. 2 (1986), and *United Technologies,* 274 NLRB 504, 505 (1985), suggesting that it will never defer a refusal to furnish information allegation. See, e.g., *Clarkson Industries,* supra at 353.

[5] Respondent also relies on these provisions and the bargaining which preceded their inclusion in the collective-bargaining agreement for its waiver argument, to be discussed infra.

[6] Although the General Counsel and the Charging Party argue that Respondent's conduct here evidences a disregard for the arbitration process, I find it unnecessary to resolve this question. There clearly has been a long collective-bargaining relationship between the parties which appears to have been productive, although the record does not contain much evidence on this point. There is no allegation of unlawful interference with employee rights or antiunion animus before me. Moreover, Respondent's actions in January were in reliance on that portion of Arbitrator Adelman's award which I found to be dicta. I am not prepared to find that as such, Respondent was repudiating the award or engaging in conduct which would make future resort to arbitration futile.

D. Supervisory Status of Sous Chefs

The 11 west private unit is a 19-bed unit. It is organized in a fashion similar to a four-star hotel or restaurant, with a "front of the house," consisting of the receptionist, guest service attendants, or "GSA," who serve as a concierge for the patients, housekeeping, maintenance staff, and the kitchen, or "back of the house," staffed by the sous chefs and food preparers. In order to manage this new unit, Respondent hired Hogarty from the hospitality industry, with no previous experience in a health care setting. When Hogarty began working for Respondent, most of the job descriptions and staffing decisions had already been made. She testified that she set up the management structure, modeled after that found in the hotels at which she had worked, with the front of the house under the supervision of "Assistant Managers." According to Hogarty, Respondent had already decided to staff the kitchen with an executive chef and food preparers. Hogarty decided, again based on her experience working in four-star hotels, to have a sous chef on each shift, under the executive chef, to provide more supervision and ensure higher quality food production. On April 29, 1993, Respondent posted openings for, inter alia, three sous chefs and five food preparers. Respondent's records show that Cynthia Narduli was initially hired as a sous chef on May 17, 1993, and reclassified to "Culinary Manager" on June 14, 1993. She hired the rest of the staff to open the 11 west kitchen. Narduli remained in her position until she left for other employment in May 1996.

From its inception, the 11 west kitchen has operated from approximately 6:30 a.m. until approximately 9:30 p.m., 7 days a week. There has always been one sous chef or ACM and one food preparer assigned to a morning shift (generally 6:30 a.m.–2:30 p.m.) and one sous chef or ACM and two food preparers assigned to an evening shift (generally 1:30–9:30 p.m.). During periods of high census, Respondent adds a third food preparer on a 10 a.m.–3 p.m. shift. Respondent's records show that until January 1994, Respondent covered these shifts with two full-time sous chefs and Narduli. In January 1994, Kathy Dawson was hired as a part-time relief sous chef to cover days off and other leave for the two full-time sous chefs. Respondent has generally covered the food preparers schedules with three full-time and three part-time employees. During the busiest part of the day, when the two shifts overlap, and when the census is high, there would be two sous chefs and four food preparers on duty. For most of the time, there is one sous chef and one–two food preparers working in the kitchen.

Hogarty testified that she developed the job description for the sous chef position after she was hired and that she did so on short notice. According to Hogarty, she initially developed global duties, such as purchasing, discipline, and menu development, and then used boilerplate from existing job descriptions to prepared a position analysis questionnaire (PAQ), which is a document used by Respondent to establish or reevaluate supervisory and managerial positions. This questionnaire is used by Respondent's wage and compensation department to determine the salary for such positions. The PAQ for the sous chefs is dated June 7, 1993. According to the general summary in the PAQ:

> [T]he purpose of this position is to prepare excellent quality food for patients and their guests on 11 West. The Sous Chef will supervise the kitchen utility staff. The Sous Chef is responsible for reviewing menus, assuring that food preparation and production conforms with State Health Department regulations and oversees appropriate level of sanitation and maintenance of the work area. The Sous Chef will provide relief coverage for the Executive Chef.

The PAQ then lists and briefly describes seven areas of responsibility:[7]

> 1. Oversees all preparation of soups, sauces, meats, poultry, fish, grill items, vegetables, and starches.
> 2. Reviews menus and assembles foods, supplies and equipment for daily food preparation. Sets up and prepares equipment for use in food preparation.
> 3. Tests and evaluates all new food products brought in for possible use, both regular and for modified diets.
> 4. Meets with executive chef and food production supervisors to discuss daily production and special events.
> 6. [sic] Assists in care and maintenance of work areas, equipments and supplies. Reports supply shortages/low stock levels.
> 7. Alerts supervisor to problems and need concerning equipment and food supplies. Detects spoiled or unattractive food, defective supplies/equipment or other unusual conditions and reports these to supervisor.
> 8. Counsels and disciplines employees. Prepares job performance appraisals and reviews the evaluation with the employee.

The PAQ also indicates that the sous chef will be responsible for recommending hire and termination of kitchen utility employees; adjusting the staffing pattern and assignment of work to meet operational needs; and contacting human resources for recruitment of staff and dealing with labor relations to resolve employee issues. However, final disposition regarding hiring and firing are expressly beyond their scope of authority.

Narduli testified, in contrast to Hogarty, that it was she who created the sous chef job description and determined their qualifications. According to Narduli, there was no specific job description for the position when she began hiring sous chefs, but that she had in mind what their duties would be from her experience working in restaurants. This experience is what she used in interviewing and selecting the first sous chefs hired. Narduli claimed that the unwritten job description was eventually reduced to writing. At one point in her testimony, Narduli candidly testified that there is a difference between a written job description and a working job description. Her working job description, as testified to at the hearing, required the sous chefs primarily to visit with patients in order to develop menu items that they would like and that would comport with any special diets they were on. The sous chefs would also be expected to order the food needed to prepare these menu items, both regular offerings and daily specials, and "supervise" the kitchen staff. When initially asked to explain what she meant by "supervise," Narduli testified that the sous chef was responsible for determining the work flow on his or her shift, assigning tasks to the food preparers and providing them with recipes, instruction, and other information they would need to complete the tasks and to ensure quality of food preparation and presentation. In response to further leading questions, Narduli testified that the sous chefs were responsible for assigning and approving overtime and disciplining employees and that they could take these actions independently. With respect to discipline, Narduli testified that the sous chefs could give out warning notices if something was going wrong in the kitchen. The authorization of overtime, according to Narduli, consisted of asking a food pre-

[7] There is no item numbered "5" on the PAQ in evidence.

parer to stay late to finish cleaning chores or to work through a break, if needed to finish preparing an item, and then initialing the employees timecard where the overtime was recorded.

In June 1994, when the arbitration hearing opened, Ray Przelomski was the evening sous chef and Dawson, as part-time relief chef, worked days and evenings.[8] Peter Murphy was hired in July 1994 as the full-time day sous chef. By December 1994, when the arbitrator issued his award, Przelomski had been replaced by Walter Robinson. Dawson, Murphy, and Robinson are the sous chefs who became ACMs in January. Dawson resigned on February 5, 1996, and was not replaced. In May 1996, Murphy was promoted to executive chef to replace Narduli and Robinson resigned about the same time.[9] Dawson and Murphy testified at the hearing.

Dawson testified that during the interview process for the sous chef position, Narduli told her that she would be responsible for supervising a small kitchen staff and interacting with patients, i.e., going over menus and diets with them. With respect to supervisory duties, Dawson recalled being told that she would be responsible for instructing staff in the production of food, quality control, and sanitary procedures. She was expected to ensure that the food was of the quality expected in a four-star restaurant. In response to leading questions from Respondent's counsel, Dawson recalled being told she would be expected to discipline kitchen staff. She testified that she was not given a written job description, although she vaguely recalled seeing one. She was hired as a relief supervisor, meaning she would fill in for one of the full-time sous chefs on their days off. Although hired for 17.5 hours/week, Dawson testified that she regularly worked more than that, averaging 4 days a week. Because she was a relief person, she worked both shifts, although more often the p.m. shift from approximately 2–10.

Dawson described a typical day as a sous chef. At the beginning of her shift, she met for one-half to 1 hour with either the sous chef who was on duty in the morning, or with the executive chef to find out what needed to be done, if there were any problems she should be aware of, or any concerns or requests from patients that she would have to deal with. She then greeted the two food preparers who were already on duty and took inventory to determine what menu items were in short supply and would need to be replenished and what ingredients and supplies needed to be ordered. She then made up the prep list for the food preparers, based on her assessment of what needed to be done. She claimed that she used some judgment and discretion in making these decisions because she would have to anticipate what the patients might order and how many of a given menu item would be needed. She also assigned specific duties to the individual food preparers. While most of the items on the prep list were routine tasks that any food preparer could do with minimal instruction and supervision, Dawson testified that there were items which not all food preparers could do well and she exercised some discretion in assigning these tasks and would have to provide instruction to food preparers who were unfamiliar with how to prepare an item. Near the beginning of her shift, she would also have to meet with patients, at least one patient every day, to go over concerns or requests for special items. Once these preliminary duties were out of the way, Dawson spent most of the remainder of her shift in actual preparation of menu items, including creating the nightly special. She would have to go over the special with the guest service attendants, including having them sample it, so they would be able to describe it to the patients, i.e., what was in it, how it was prepared, etc. If things were slow, Dawson might also spend some time working on new menu items, trying out recipes and creating samples. At the end of her shift, Dawson would place the order for food supplies by calling the approved vendor and leaving the order on an answering machine. She would also review the prep list to determine if any items were not finished and would have to be carried over to the next shift and would write a note in the diary for the next day's chef, or communicate orally with the p.m. chef if she had worked the a.m. shift. Dawson testified that she spent at least 50 percent of her shift in actual cooking and preparation of food.

Murphy testified that he applied for the position of sous chef in June 1994. During his interview with Narduli, she told Murphy that he would be working mostly on the day shift; that he would be required to open up the kitchen, prepare breakfast and lunch, and would have some requisitional duties. She also told him he would be working with one food preparer whom he would supervise. Murphy testified that Narduli further informed him that he would be responsible for everything that happened in the kitchen on his shift. Specifically, he would be responsible for delegating duties to the food preparer to make sure the food required was produced. He would have to assess what needed to be done and assign tasks not only to the food preparer on the a.m. shift but also to the two food preparers coming in on the night shift. Murphy further testified that, when he had his second interview with Hogarty, she emphasized to him the management aspects of the position, telling him that the previous sous chefs were terminated because of their lack of supervisory skills. Murphy testified he had prior experience as a sous chef, overseeing the work of five employees working at different stations, making sure the work got done. He testified he had disciplinary authority in his previous employment.

After being hired as an a.m. sous chef, Murphy started work at 6:30 a.m. and would stay until lunch orders were finished and everything was in place for the p.m. shift, sometimes working until 5 p.m. Narduli, the executive chef, was also on duty during his shift. According to Murphy, he met with her a few times during the day to discuss what things needed to be done, e.g., any ordering that needed to be done or special cleaning projects to assign. According to Murphy, Narduli did not spend much time in the kitchen, but she would occasionally come in, assess how things were going, exchange small talk with the food preparer and walk out. Narduli did not do any cooking while Murphy was in the kitchen.

Murphy testified that when he worked as an a.m. sous chef, he would get the keys from the receptionist when he arrived for work at 6:30 a.m. and would open the kitchen, turn on the ovens, and set up his workstation. He would then start making muffins and oatmeal. He also made up the prep list for the 1 a.m. food preparer. At the end of his shift, he would speak to the p.m. sous chef coming on duty and tell him/her what still needed to be done from the morning prep list.

The record contains no evidence that sous chefs hired, transferred, laid off, recalled, promoted, discharged, or rewarded any employee prior to January 1995. Although the June 1993 PAQ provides that sous chefs will be responsible for recommending

[8] Based on Respondent's records which are in evidence, it appears there was no third sous chef between the April 5, 1994 termination of Edward Penn and Murphy's hiring on July 19, 1994. Based on testimony from Dawson and Narduli, it appears the morning shift was being covered by Narduli and Dawson during this time.

[9] Murphy and Robinson were replaced by Simone Shaw and David Victoriano, respectively.

hire and termination of kitchen utility staff, and will have contact with the human resources department for staff recruitment, Respondent's witnesses acknowledged that they had no involvement in hiring and firing before January 1995.[10] Similarly, although the PAQ states that sous chefs will evaluate employees, they did not do so before January 1995. Those performance appraisals which were completed in 1994 were done by Narduli and there is no evidence that any sous chef was consulted or had input into these evaluations. The record does contain evidence that the sous chefs issued disciplinary notices to employees, initialed their timecards when they worked overtime or did not get a break and assigned and directed the work of other employees. Each of these indicia of statutory supervisory authority for which evidence is present in the record must be reviewed carefully to determine the extent to which the exercise of such authority by the sous chefs was "not of a merely routine or clerical nature, but require[d] the use of independent judgment." I also note, in considering the evidence, that the burden of proof is on Respondent here as the party asserting supervisory status. See, e.g., *Children's Farm Home,* 324 NLRB 61 (1997); and *Hydro-Conduit Corp.,* 254 NLRB 433 (1981).

Respondent's witnesses testified that an employee could not be paid overtime unless a supervisor approved the overtime. Based on the testimony of Narduli, Dawson, and Murphy, this apparently consisted of asking or instructing the employee to stay late or work through break and then initialing the timecard. The need to work such overtime was dictated by workflow, e.g., dishes came back late from patient's rooms and someone had to stay to finish cleanup, or an employee was in the middle of a recipe when it was time for their scheduled break. Dawson testified that an employee could refuse to work through a break. Respondent's human resources policies regarding hours of work and overtime do not specifically require a supervisor to approve overtime, but they do specify that "the department head or designee" is responsible for completing the summary of hours on the top of the timecard and signing the timecard on the "approved by" line. There is no dispute that the sous chefs did not calculate the hours nor sign the timecard on the "approved by" line. This was done by the front of the house assistant managers who are undisputed supervisors. The policies also require that the department head or designee initial the handwritten time when an employee fails to punch in or out. There are no instances on the timecards in evidence where a sous chef did this. Those instances where a time has been written are initialed by assistant managers. The timecards and payroll records which are in evidence, offered by Respondent and the General Counsel, do not support the testimony of Respondent's witnesses. There are many instances where payroll records show an employee received overtime pay without any sous chef's initials on the relevant timecard. Based on the record evidence, I must discredit the testimony of Respondent's witnesses to the extent they claim that employees could not receive overtime pay unless a sous chef approved and initialed the overtime. Moreover, any exercise of authority involved in asking or instructing an employee to work overtime hours based on workflow demands is routine and the initialing of timecards merely a clerical function.[11]

There is no question that the sous chefs assigned work to the food preparers by giving them a prep list with items checked for them to do each day. However, despite Dawson's and Murphy's testimony to the contrary, the exercise of this authority did not require the type of independent judgment which has been found by the Board or the courts as necessary to convert a leadman or straw boss to a statutory supervisor. *Telemundo of Puerto Rico v. NLRB,* 113 F.3d 270, (1st Cir. 1997). See also *Children's Farm Home,* supra, and *Hydro Conduit Corp.,* supra, and cases cited there. Thus, the food preparers in the 11 west kitchen performed routine tasks, e.g., retrieving supplies from the refrigerators or pantry, chopping vegetables, making soups, baking, preparing sauces, washing dishes, mopping floors and cleaning equipment, and otherwise assisting the chef, which did not vary greatly from day to day. With minimal training, any food preparer was expected to be able to perform any task. Food preparers Yvonne Pickett and Molinas Sheeko testified credibly that they themselves would sometimes divide up assignments, particularly cleanup chores. The sous chefs also had some responsibility for the production and quality of food prepared in the 11 west kitchen on their respective shifts. In this regard, I do not doubt that the sous chefs gave instruction to the food preparers, checked their production and, as Narduli characterized it, directed the workflow. This direction of other employees by the sous chefs stems from their superior training, skills and experience as chefs, and is incidental to carrying out their tasks as the lead cook, rather than their role as agents of the Employer. Ultimate responsibility for the operation of the kitchen on 11 west resided with Narduli, the executive chef, who was accessible to the sous chefs at all times, even when not physically present on the unit. Accordingly, the record does not establish that the sous chefs had the authority to "responsibly direct" other employees, as interpreted by the Board. *Providence Hospital,* 320 NLRB 717, 725–730 (1996), affd. sub nom. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 548 (9th Cir. 1997), and cases cited therein.

Respondent has a progressive disciplinary policy providing for counseling and verbal reprimand before issuance of a written warning, unless the employee's first offense is considered serious enough to warrant a written warning or immediate dismissal. Under Respondent's policy, an employee's "immediate supervisor" has the initial responsibility for taking "corrective action" for infractions of Respondent's written rules of conduct, but is "encouraged to consult the Employee/Labor Relations Manager" before suspending or discharging an employee. Respondent utilizes a form to document disciplinary actions beginning with the written warning stage. Testimony and documentary evidence in the record show that verbal warnings or counseling are documented by a memorandum or "documented conference." The form "warning notice" has a space to identify the "immediate supervisor" and signature lines for the "supervisor" who issues the notice, the employee, a witness in the event the employee refuses to sign, and for a "supervisor" to sign in the event the employee refuses to accept a copy of the warning. With respect to bargain-

[10] Although Narduli testified at one point that the sous chefs "actually approved and hired the food preparers," this was contradicted by Respondent's other witnesses and personnel records. Similarly, Murphy's testimony that he made recommendations to the assistant managers regarding the performance of new GSAs who were hired during the time he was a sous chef, and participated in the decision whether they passed probation, is contradicted by his pretrial affidavit. Moreover, although Respondent produced a multitude of documents to establish supervisory status, no documentary evidence to corroborate any involvement of sous chefs in hiring or evaluating new GSAs was offered. Accordingly, I discredit Narduli's and Murphy's testimony in this regard.

[11] Murphy testified that he scheduled employees and authorized time off for employees during the time he was a sous chef. He acknowledged that he only did this when providing relief coverage for the executive chef. This testimony is contradicted by his pretrial affidavit in which he denied scheduling employees, authorizing vacation, and time off while a sous chef. Accordingly, I discredit this testimony.

ing unit employees, Respondent's policy provides that the supervisor read the warning notice to the employee in the presence of a union delegate and call in another supervisor to sign as a witness if the employee refuses to sign the notice.

Disciplinary records in evidence for the period prior to Arbitrator Adelman's December 1994 award show four warning notices identifying a sous chef as the immediate supervisor who issued the warning and one memorandum documenting a verbal warning signed by a sous chef. There are a total of 16 instances of disciplinary actions during this period in evidence.

Although the 11 west unit opened about June 1993, there is no evidence of any sous chef participating in disciplinary actions until November 23, 1993. Ray Przelomski, the p.m. sous chef, signed two warning notices that date as a witness that the employee, Eric Mercado, refused to sign the warnings. Narduli is identified on this and all other warnings issued to Mercado as the immediate supervisor. Moreover, it was Narduli who ultimately discharged Mercado on January 28, 1994, for closing the kitchen without finishing cleanup duties, after she had given him several warnings and two suspensions, primarily for attendance problems.[12] Mercado was a food preparer assigned to the p.m. shift, the same shift Przelomski was assigned as sous chef. Narduli testified that she prepared the warning notices for Mercado, even though Przelomski was his putative supervisor, because Przelomski had only been employed by Respondent since September 1993 and was a new person. I do not find this explanation credible because it is inconsistent with her testimony and that of Hogarty that in order to be hired as a sous chef, applicants had to have management and supervisory experience. With such experience, a sous chef would be expected to know how to discipline an employee in much less than 2 months time.

Narduli testified with respect to the warnings witnessed by Przelomski that she was the one who discovered the particular infraction, i.e., calling in 15 minutes after the start of his shift to say he would be late and punching out without cleaning the kitchen, and decided to discipline Mercado. She testified that she did not recall discussing the warnings with Przelomski before giving them to Mercado. Przelomski's mere presence as a witness to issuance of discipline does not reveal the exercise of any independent disciplinary authority. The fact that Respondent's internal policies may refer to such witnesses as supervisors does not translate what amounts to a ministerial or clerical function into statutory authority. This is also true of those other instances relied on by Respondent where a sous chef or ACM merely signed a warning notice as a witness that the discipline was given.

The first warning notice signed by a sous chef as the "supervisor" is dated March 18, 1994. This was a first warning issued to Molinas Sheeko, another food preparer on the p.m. shift, after the opening kitchen staff found dishes Sheeko washed the night before were so filthy that they were unusable. Przelomski had been the sous chef on duty during Sheeko's p.m. shift, but it was Narduli who discovered the infraction the next morning. Narduli testified that she called Przelomski into her office when he arrived for work and told him that he had to do something about this. Narduli prepared the warning. Her name is crossed out and Przelomski's name is handwritten in the "immediate supervisor" box. Przelomski signed the warning notice as the supervisor. Sheeko testified that it was Narduli who first talked to him about the dishes and that Przelomski merely read the warning notice to him. Przelomski did not testify. The facts regarding this instance of discipline, as related by Narduli herself, establish that it was Narduli who made the decision to discipline Sheeko without any recommendation from Przelomski. Przelomski's signature on the warning notice and his act of reading it to Sheeko are ministerial and clerical functions and do not establish the existence of independent disciplinary authority.

Dawson issued two warnings during the time she was a sous chef, both to Sheeko. She gave Sheeko a "second warning" on April 18, 1994, for failing to follow her instructions to keep up with the dirty dishes.[13] The infraction had occurred on April 13, 1994, and Dawson admitted that she discussed it with Narduli before preparing the warning. She also discussed with Julie, one of the assistant managers in the front end, and an undisputed supervisor, how to prepare a warning using Respondent's human resource policies and form. Dawson testified that she made the decision independently and merely informed Narduli that she was going to discipline Sheeko. When she called Sheeko into the office, she read him the warning and had the union delegate and Robin Fertig, another assistant manager present to witness it. I do not credit Dawson's testimony, which was elicited by leading questions from Respondent's counsel that she acted independently in issuing this warning. I note that she admitted discussing the incident with Narduli before preparing the warning and that 5 days elapsed between the infraction and the disciplinary action. If Dawson truly had independent authority to discipline Sheeko for this incident, she would have given him the warning that night, without consulting anyone.

On June 10, 1994, Dawson gave Sheeko a "final warning" for wasting spinach on June 6. Again, in response to leading questions, Dawson testified that she acted independently, without seeking permission from anyone. Although the warning notice indicates that Dawson found usable spinach in the garbage a "short while" after instructing Sheeko to clean the spinach, the warning was issued 4 days later. Sheeko testified that it was Narduli who showed him and union delegate Yvonne Pickett a pan of spinach allegedly found in the garbage and called them into the office. Dawson merely read the warning notice to him. Sheeko, as a current employee testifying adversely to his employer, is inherently credible. *Georgia Rug Mill,* 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). Because of the lapse in time between Dawson's alleged discovery of the infraction and the issuance of a disciplinary notice, as well as her general failure to recall many events from the time she worked as a sous chef, I discredit her denial that she sought authorization from Narduli before issuing this warning.

Murphy also issued two warnings during the time he was a sous chef, both to food preparer Alromeo Campbell. The first, on October 23, 1994, was a verbal warning for lateness. The language in the memorandum documenting this verbal warning is identical to that appearing in documented conferences for attendance infractions issued by Assistant Manager Nidetz on June 13, 1994, and by Dawson, as an ACM, in March 1995. Murphy testified that he recognized that Campbell had a problem getting to work on time and began monitoring his tardiness. After a certain number of occurrences, according to Murphy, he decided to verbally warn Campbell.[14] In response to leading questions, Murphy denied that

[12] Mercado's discharge was converted to a resignation as a result of a grievance filed by the Union.

[13] Sheeko's "first warning" is the one discussed above which was issued under Przelomski's signature.

[14] The record reflects that Campbell had already had a documented conference for excessive lateness with Assistant Manager Nidetz, an undisputed supervisor, on June 13, 1994.

he asked for, or needed, permission to give this warning. According to Narduli, under Respondent's lateness policy, an employee is given a grace period of 3 or 4 minutes before they are considered late and a certain number of occurrences before disciplinary action "must be taken." This is consistent with testimony from Dawson that she was expected to review timecards monthly for lateness and absenteeism and that it was "standard practice" to write someone up if there were too many occurrences. Accordingly, I discredit Murphy to the extent he claims to have exercised any independent authority in verbally warning Campbell. Murphy has already been found to have exaggerated his authority in other respects. Based on the testimony of Narduli and Dawson, I find that this instance of discipline was pursuant to guidelines which did not leave any discretion with respect to discipline for attendance problems and amounts to a ministerial act.

On November 28, 1994, Campbell received a final warning with a 3-day suspension for loafing or sleeping on duty and absence from post. Although Murphy is identified as the "immediate supervisor" on the warning notice, Hogarty signed the warning notice and Murphy signed as a witness that Campbell refused to accept a copy of the warning. Murphy testified that, on November 28, 1994, when he did not see Campbell at work after the start of his shift, he investigated and found that Campbell had already punched in and went looking for Campbell. Murphy testified that he ran into Campbell coming out of the breakroom and Campbell said he had fallen asleep. According to Murphy, he decided to give Campbell a written warning for this without consulting with anyone. He gave the warning to Campbell in the chef's office in the presence of Grishel Brown, a GSA. He denied that any management representative was present. When Campbell refused to sign the warning, Murphy asked Brown to sign as a witness and Murphy himself signed on the line for a supervisory witness. Later that day, according to Murphy, he brought the warning to Hogarty for her to sign. Hogarty signed on the line for the supervisor who issues the warning. Murphy explained that he brought the warning to Hogarty to sign because it was hospital policy that the next level supervisor sign warnings. Hogarty did not testify regarding this warning or how her signature came to be on it. I discredit Murphy's testimony that he made the decision to suspend Campbell without consulting with anyone. As noted above, Murphy demonstrated a tendency to exaggerate his authority throughout his testimony. His explanation for Hogarty's signature appearing on the supervisor's line makes no sense. Accordingly, I find, as is evident from the face of the document, that Hogarty suspended Campbell and that Murphy acted as a witness. Although Murphy may have reported the incident to Hogarty, in the absence of her testimony, I am unable to conclude that Murphy had any further input in the decision to suspend Campbell.

Based on the above, I conclude that the four instances of discipline ostensibly issued by the sous chefs, do not evidence the kind of independent authority which would convert a leadman or straw boss to a statutory supervisor. Respondent also offered evidence regarding secondary indicia of supervisory authority. However, the Board has held that it is unnecessary to consider such evidence in the absence of statutory indicia of supervisory authority. *Bozeman Deaconess Hospital,* 322 NLRB 1107 fn. 2 (1997). In agreement with the arbitrator, I conclude that the sous chefs were not statutory supervisors.

In the absence of evidence that they fit any of the other exclusions specified in the recognition clause of the parties' collective-bargaining agreement, I conclude further that the sous chefs were properly included in the unit at the time Respondent took the actions which are the subject of the complaint.[15] I note that the unit covered by the collective-bargaining agreement already includes the position of first cook, with a rate of pay, as of October 1994, similar to that received by the sous chefs before there promotion to ACM.

E. Respondent's Response to the Arbitration Award

Hogarty and Courounis, Respondent's director of labor relations at the time, testified that, after reviewing Arbitrator Adelman's award, they met first with Respondent's legal department and then with each other to determine how Respondent was going to comply. Courounis testified that he and Hogarty decided that Respondent still needed supervision in the 11 west kitchen during times when Narduli was absent. Courounis testified further that they believed Adelman's award provided a basis for creating a supervisory position to address this need. Hogarty testified that the arbitrator "directed" Respondent to put only the a.m. sous chef in the bargaining unit because there was a redundancy of supervision during those hours when both the sous chef and Narduli were on duty. Both agree that Respondent decided to put only one sous chef in the bargaining unit while maintaining three supervisory positions and to promote the current sous chefs into these supervisory positions. Apparently no consideration was given to simply putting the three sous chefs in the unit, as the arbitrator awarded, and then creating a position to address whatever need for additional supervision Respondent may have had.

Hogarty testified that she created a union sous chef position by taking the old job description contained in the PAQ and stripping it of any authority that might be considered supervisory. Hogarty then prepared separate PAQs for each of the sous chefs to "re-evaluate an existing position" under Respondent's human resource policies.[16] Respondent's human resource policies define a reclassification as a change of job titles and indicate that this would be appropriate whenever it becomes clear that the employee is not performing the work implied by his or her job title and described in the job description or PAQ. The written policies further provide that a nonunit employee is to be reevaluated and assigned to a different pay grade whenever it becomes evident that the pay grade initially assigned to the job was incorrect or the employee's duties and responsibilities have changed to such an extent that the job has increased or decreased enough in overall worth to warrant a change in grade. A separate policy describes the procedure for adding a new position to a department's table of organization and indicates there are three situations where that would be appropriate: work volume has materially and permanently increased due to additional functions assumed by the department; work volume has temporarily or seasonally increased or the department has under-

[15] Although Respondent argued in the arbitration proceeding that sous chefs were also excluded from the unit as professional employees within the meaning of Sec. 2(12) of the Act, it has not raised that contention here. In any event, as Arbitrator Adelman pointed out in his decision, the recognition clause of the collective-bargaining agreement does not specifically exclude professional employees.

[16] Narduli testified, in contrast, that she was the one responsible for creating a new job description for the sous chef, removing anything supervisory in nature, and a new PAQ for the ACM position by assigning specific additional duties to each of the current sous chefs. On cross examination, Narduli contradicted herself by testifying that it was someone in labor relations who created the unit sous chef position and that she had nothing to do with this. She testified that she "created" the "working job description" for the unit sous chef after the position was filled by defining the tasks for which the incumbent of this position would be responsible in order to make the kitchen run efficiently.

taken a special project or temporarily assumed additional functions; or an additional employee is required during a vacation period.

Both Hogarty and Narduli testified that each of the sous chefs was given specific additional responsibilities to justify the reevaluation/reclassification. Murphy, the a.m. sous chef, was given responsibility for scheduling the food preparers and approving requests for time off; Robinson, the p.m. sous chef, was given responsibility for recruiting and hiring staff on his shift and doing evaluations; and Dawson, the relief chef, was given additional requisition duties. The PAQs signed by Hogarty which Respondent put in evidence do not support this testimony. On the contrary, they are identical and contain no reference to the specific duties described by Hogarty and Narduli. The revised PAQ does enhance and describe in greater detail the authority of ACMs to hire, discipline, and evaluate employees and otherwise exercise 2(11) authority. Nevertheless, Hogarty conceded and the PAQs confirm that the ACMs would continue to spend the majority of their time performing the same food preparation duties they had performed as sous chefs.

Hogarty submitted the new PAQs for Dawson, Murphy, and Robinson, which sought to rename the sous chefs as ACMs with a salary upgrade, along with a "Personnel Requisition" form for the unit sous chef to human resources on or about January 10, 1995. The personnel requisition indicates that the sous chef position was being reclassified due to the outcome of an arbitration and indicates the hiring salary as $14.85/hour for 37.5 hours/week. Dawson, Robinson, and Murphy were reclassified and Robinson and Murphy were given promotional increases effective January 16. Dawson, who was already paid at the rate of $20/hour, substantially more than the other sous chefs, received no increase. Murphy's hours were reduced from fulltime to 17.5 hours/week at the same time. The personnel action forms to accomplish these changes were typed January 10. The unit sous chef position was not posted until February 17. Oscar Cardona was the only employee to bid and he was given the job on March 20.

Respondent's witnesses disagree regarding when and how these changes were announced to the staff. Hogarty testified that, 1 or 2 days after the January 19 meeting with the Union, she held a "regular quarterly meeting" with the entire staff of 11 west, including front of the house employees, and that she told the staff that a unit sous chef position would be posted and that the current sous chefs had been promoted to ACMs. No one corroborated Hogarty regarding such a meeting. Narduli testified that she attended a meeting with Hogarty and the sous chefs only, sometime after the arbitration award, at which Hogarty explained the outcome of the arbitration and told the sous chefs there would be a unit sous chef but that they would become ACMs. Dawson, whose recollection of events surrounding her change in title was almost nonexistent, did recall a meeting similar to the one described by Narduli. Murphy testified at first that he was informed individually by Narduli that he was getting a promotion because of his performance. Although he also recalled, with further questioning, a meeting similar to that described by Narduli, he did not recall any staff meeting resembling that described by Hogarty. In any event, Respondent did not announce by memo these putative changes in culinary management, as it did in April 1996 when Murphy replaced Narduli as executive chef.

The evidence in the record shows that, after January 16, 1995, the ACMs did exercise ostensibly more statutory supervisory authority. This is particularly true with respect to Murphy. Thus, Murphy testified without dispute that he independently hired three new food preparers, recruiting them from sources he identified, narrowing down applicants and interviewing those he believed were best qualified, and then selecting the individual to whom an offer of employment was made. Although Respondent's personnel policies provide that only the human resources department can extend a job offer, there is nothing in the record to indicate that Murphy's recommendation regarding the hiring of these three employees was not followed without additional review. Moreover, Murphy testified that he trained these new employees, as well as the unit sous chef, Cardona, and recommended whether they should pass probation. There is no evidence in the record that anyone else in the supervisory hierarchy independently reviewed Murphy's recommendations. Murphy also performed scheduling functions, although these appear to be more routine and clerical in nature since almost all employees in the kitchen had specific schedules and shifts, and vacation and other time off was governed by the collective-bargaining agreement.

Both Murphy and Robinson prepared employee evaluations after they became ACMs, but the record is silent regarding what effect, if any, these evaluations had on the employees' terms and conditions of employment. Wage increases were governed by the collective-bargaining agreement and there is no evidence that Respondent uses the evaluations for any other purpose affecting unit employees' wages or tenure. See *Children's Farm Home,* supra. Moreover, under Respondent's human resources policy and in practice, Narduli reviewed and approved these evaluations before they became final.

The record also contains evidence of additional disciplinary notices issued to unit employees which were signed by the ACMs during calendar year 1995. Dawson signed four, including a suspension of Sheeko in March 1995, and Robinson signed two, including a discharge notice for Campbell in October 1995. With respect to Campbell's discharge, the testimony of Narduli establishes that she made the determination to discharge the employee and instructed Robinson to carry it out. Most of the discipline after January 1995 was for attendance violations.

Respondent's records show that Respondent made other changes affecting the 11 west unit around the same time it "reevaluated" the sous chef position. On January 9, Hogarty was promoted to associate director of support services and Narduli received a promotional increase in excess of 5 percent, without a change in title. Hogarty testified that, in her new position, her responsibilities were expanded beyond 11 west and her office was moved to another building. No one replaced her as manager of 11 west. Instead, according to Hogarty, the assistant managers were made responsible for the front of the house and the sous chefs/ACMs for the kitchen. Hogarty further testified that, at the same time, Narduli was given additional responsibilities in the catering department as Respondent sought to reduce its expenses by doing in-house catering rather than hiring outside vendors. Hogarty testified that the latter change had been under consideration since approximately late December, after Hogarty had received from Respondent's finance department a percentage figure by which she had to reduce her budget for 1995. Narduli's additional catering responsibilities were expected to take her away from 11 west more often. According to Hogarty, this was part of the reason for upgrading the sous chefs to ACMs and giving them additional supervisory responsibilities. However, Hogarty testified that catering production did not move to a kitchen in another building until the summer 1995. Hogarty further testified that Narduli spent approximately 40 percent of her time on catering. In contrast, Narduli testified that she was doing catering for only

8–10 months before she resigned employment in May 1996 and that the amount of time she spent on catering increased over a period of time to an average of 20 hours/month. Respondent offered no records to document the budgetary decisions which Hogarty testified about, nor did they offer any documentation to show the additional duties and responsibilities given to Narduli in January. I find, based on Narduli's more credible testimony in this regard, that her additional catering responsibilities did not affect her presence on 11 west until July at the earliest, 6 months after the reclassification of the sous chefs.

I find further that the promotion of Hogarty and the assignment of additional catering responsibilities to Narduli was not the motivating cause of the reclassification/reevaluation of the sous chefs to ACMs. All of Respondent's witnesses became evasive and claimed to have problems recalling conversations and discussions regarding the arbitration decision and its impact on the sous chef position. This evasiveness, when contrasted with the directness of their responses when questioned by Respondent's counsel, convinces me that Respondent's witnesses were attempting to conceal the true motivation behind the reclassification of sous chefs, i.e., to keep this position out of the unit. It is clear from the testimony of Courounis and Hogarty that it was Adelman's award that set in motion the changes affecting the sous chefs. Any decision to do more in-house catering made around this time may have been facilitated by Respondent's decision to give more supervisory duties to the sous chefs, but it was not the reason for doing so. Moreover, Narduli's testimony establishes that the amount of time she was required to spend on catering responsibilities was not so significant as Hogarty claimed and did not increase until much later than January.

I further find, based on the overwhelming weight of the evidence, that Respondent made a decision in late December 1994 or early January to "re-classify" the sous chefs in order to keep them out of the bargaining unit, notwithstanding the arbitrator's award, and that Respondent effectuated that decision by changing the employees' job titles, giving them a salary increase and modifying their job descriptions to make it appear they had additional responsibilities sufficient to justify the reclassification. Respondent accomplished these changes no later than January 10 when the personnel action forms implementing the changes were typed. As previously noted, Respondent's witnesses conceded that the Union was not informed of these changes until the January 19 meeting.

F. Respondent's Contact with the Union and the Union's Request for Information

While Hogarty, Courounis, and Narduli were busy discussing and implementing these changes to the sous chef position, Union Representative Estela Vazquez called Courounis to request a meeting to negotiate the wage rate for the sous chef, as directed by the arbitrator. Courounis agreed to meet on January 19. Courounis admitted that he said nothing to Vazquez during this call about the changes Respondent was considering. Courounis testified that, in the same call, Vazquez asked him for the names, dates of hire, wage rates, and job descriptions for the sous chefs. Vazquez denied requesting this, or any other information, before the January 19 meeting.

Courounis testified that he instructed Hogarty to gather this information in preparation for the meeting. Hogarty testified that Courounis called her a few days before the January 19 meeting and asked her to gather this information in preparation for a meeting with the Union to negotiate the sous chef's wage rate and that she prepared a memo to Courounis setting forth the names, dates of hire, wage rates, and hours of work for the individuals working as sous chefs at the time of Adelman's award. She testified that she brought this memo and the job description she had prepared in 1993 to the January 19 meeting. The "job description" offered into evidence by Respondent as the one Respondent was prepared to give to the Union at the meeting is, in fact, only a portion of the PAQ Hogarty prepared in 1993 and is entitled "ADA 1990 Essential Job Functions Summary." Ken Kruger, Respondent's vice president of human resources and labor relations testified that this is not a job description, but a document used by human resources in hiring employees under the Americans with Disabilities Act.

The January 19 meeting was attended by Vazquez and union delegates Pickett and Owen Hoarsley for the Union and Courounis, Hogarty, and Narduli for Respondent. Courounis testified that he had the memo from Hogarty and the "job description" described above which Courounis planned to give to Vazquez. According to Courounis, he began the meeting by going over the information he had. He told Vazquez that the job description for the sous chef was the same except for the supervisory functions which had been removed. He then told Vazquez what the rate of pay had been for the nonunit sous chefs, i.e., $28,000/year or $536/week and he read the information from Hogarty's memo. Courounis testified that Vazquez said nothing upon receiving this information. Although he acknowledged that a purpose of this meeting was to negotiate the wage rate for the unit sous chef position, Courounis could not recall whether he proposed a wage rate at this meeting until he had reviewed his notes of that meeting. Having refreshed his recollection with the notes, he testified that he proposed the $536/week as the rate for the unit sous chef position. Vazquez did not respond to this proposal. Courounis then told Vazquez that Respondent was creating an assistant culinary manager position, that the current sous chefs had been put into that position and that Respondent was prepared to negotiate for one unit sous chef position. He told the Union that Respondent decided it needed supervision for the unit particularly when Narduli was not there and that Respondent relied on the arbitrator's decision for guidance. At that point, Vazquez called for a caucus. Courounis acknowledged that she seemed surprised by his announcement. After about 10 minutes, Vazquez came back into the room and, without sitting down, said, "[W]e need more information. You're not bargaining in good faith. We're going to take this back to the arbitrator to determine the rate. This meeting is over." According to Courounis, he responded, "[O]kay" and Vazquez left. Courounis testified that Vazquez did not identify what additional information she needed and he did not ask. Courounis testified he interpreted her statement, based on his experience dealing with the union, as indicating that the union was going to investigate the matter on its own.[17] He specifically denied that she requested the ACM job description. Courounis testified that, although he saw Vazquez almost daily thereafter, she never requested any specific information regarding the sous chefs or ACM, nor did she reduce her request for "more

[17] Courounis contemporaneous notes of the meeting, which he admitted would be more accurate than his present recollection, reflect that Vazquez said "we still need information." Courounis testified that he interprets this statement the same way, i.e., that the union needed to do its own investigation.

information" to writing. Courounis left Respondent's employ in February 1995, about 1 month after this meeting.[18]

As noted above, Vazquez denied requesting any information from Courounis before the meeting. She also denied receiving information at the meeting. According to Vazquez, Courounis opened the meeting by telling the Union that the people who had been called sous chefs had been promoted to ACMs and that Respondent was going to post one vacancy for a sous chef in the unit at $536/week.[19] Vazquez testified that she asked Courounis: "If all these people are going to be ACMs, who are they going to supervise since [Respondent] was only going to have one sous chef?" She also asked how Respondent was going to have three people who were sous chefs doing something else, and who was going to do the work the sous chefs used to do if there was going to be only one sous chef? Courounis did not answer. Vazquez testified that she then asked Courounis for the sous chefs' salary—what they had been receiving and what they were going to get as ACMs—and for a job description for the ACM position. Courounis responded: "fine." Vazquez testified that she never received this information, even though she followed up her request sometime after the meeting. She admitted that she never reduced her request to writing. On cross-examination, Respondent elicited the fact that the unfair labor practice charge, as originally filed within a month of this meeting, did not allege a refusal to furnish information and that Vazquez did not mention in her pretrial affidavit about following up her request after the meeting.[20]

I find that neither Courounis nor Vazquez are totally credible regarding this meeting and that the "corroborating" witnesses, Hogarty and Narduli, do not corroborate Courounis' denial that Vazquez requested information at the meeting. Their failure to recall whether Vazquez requested information is not conclusive. On one hand, Courounis' testimony that Vazquez requested the name, date of hire, wage rate, and job description of the sous chefs before the meeting and that he had this information at the meeting and read the wage data to the Union is credible. It makes sense that the Union would request such information in advance of a meeting at which the Union expected to negotiate the sous chefs' terms and conditions of employment, as directed by the arbitrator. There would be no other reason for Respondent to have compiled this information before the meeting. Moreover, Courounis' contemporaneous notes of the meeting corroborate his testimony that he read the information in Hogarty's memo to the Union before announcing the changes Respondent had already implemented. However, Courounis' denial that Vazquez asked for any additional information at the meeting is not credible. Courounis' testimony here was contradicted by those same notes of the meeting, which clearly show that Vazquez said "[W]e still need information." Courounis conceded that the notes are a more accurate reflection of what happened at the meeting than his testimony at the hearing, more than 2 years later. Moreover, it makes sense that, after being hit with the news that the sous chefs were now ACMs and no longer in the unit, Vazquez would want information to investigate this sudden change. Thus, I credit Vazquez that she asked Courounis for the wage rates of the sous chefs before and after their change to ACMs and for a job description of the new ACM position. I do not believe Courounis post-hoc interpretation of his notes, 2 years after the fact, as indicating that Vazquez wanted to investigate further on her own, rather than that she wanted Respondent to provide the information.

Respondent does not contend that it has provided the Union with the wage rates of the ACMs or the job description of the reevaluated sous chef/ACM position. Such information is clearly relevant to the Union's performance of its representational functions, even if Respondent is correct that the ACMs are nonunit employees. The promotion of the recently included unit employees into this position had a potential impact on unit employees and unit work and the information would be necessary for the Union to evaluate whether the change from sous chefs to ACM violated the agreement or the arbitrator's award. Thus, the Union was entitled to this information, unless Respondent can show that the Union had waived its rights under the contract.

G. Respondent's Duty to Bargain

Having found, in agreement with the arbitrator, that the sous chefs were nonsupervisory unit employees, and that Respondent implemented changes in their salary, duties and responsibilities, on January 10, with the intent of conferring supervisory authority on them and thereby affecting their unit status, it must be determined what, if any, obligation Respondent had to notify the Union and bargain about these changes, if requested. I will initially assume, for purposes of argument, that the additional authority conferred on the sous chefs and exercised by them was sufficient to establish the supervisory status of the reclassified ACM position.

The General Counsel argues, on the one hand, that Respondent's actions amounted to an alteration in the definition or scope of the unit, a permissive subject of bargaining, and that Respondent could not implement these changes without the Union's consent. See, e.g., *Holy Cross Hospital,* 319 NLRB 1361 (1995). In the alternative, the General Counsel argues that Respondent had an obligation to bargain in good faith, to agreement or impasse, before implementing these changes because they involved a transfer of unit work out of the unit, a mandatory subject of bargaining. See, e.g., *Hampton House*, 317 NLRB 1005 (1995). Respondent argues that it had no obligation to notify or bargain with the Union about the January reclassification because the sous chef position was never in the bargaining unit and the work that they performed had never been performed by unit employees. Respondent relies on Board cases recognizing the right of an employer to unilaterally create new supervisory positions and to select individuals to fill these positions. See, e.g., *St. Louis Telephone Employees Credit Union,* 273 NLRB 625 (1984).

In *Holy Cross Hospital,* supra, the employer and the union had a disagreement over the continued inclusion in a nurses' unit of "house supervisors." Unable to resolve their differences, the employer submitted the dispute to the Board through a unit clarification proceeding. The Board, by its Regional Director, resolved the dispute after a hearing, finding that the "house supervisors" were not statutory supervisors and were unit employees. Thereafter, the employer devised a plan to create a new nonunit position, called

[18] Hogarty's recollection of this meeting is similar to that of Courounis, except that she did not recall Vazquez saying anything about information at the meeting. This testimony is contradicted by Courounis' contemporaneous notes of the meeting. Although Narduli testified that she was present at the meeting, she had very little recollection regarding what happened there.

[19] Vazquez testified that she was under the belief that the sous chefs were being paid $700/week and she may have proposed this rate for the unit sous chef. The information Courounis claimed to have given Vazquez at this meeting in fact reveals that only Murphy was paid an amount equivalent to Respondent's proposal to the Union and that Dawson and Robinson received more. Respondent's personnel records, in contrast, reveal that Murphy's salary was in fact $575/week, not $536 and that no sous chef hired by Respondent to that date had started at $536/week.

[20] Pickett testified briefly regarding this meeting. She did not testifying to any request for information made by Vazquez at the meeting nor any exchange of information by Respondent.

"shift manager" in order to satisfy its perceived need for additional supervisory coverage. Many of the duties of the house supervisors were transferred to this new position which apparently everyone agreed was a statutory supervisor. The employer's plan resulted in the virtual elimination of the unit house supervisor position. The Board, in adopting the administrative law judge's finding that the employer violated Section 8(a)(5) of the Act, emphasized that "once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the Employer cannot remove the position without first securing the consent of the Union or the Board." 319 NLRB 1361 fn. 2. Accord: *Arizona Electric Power,* 250 NLRB 1132 (1980). See also *Hill-Rom Co. v. NLRB,* 957 F.2d 454, 457 (7th Cir. 1992); and *Lincoln Child Center,* 307 NLRB 288, 315 (1992).

In *Hampton House,* supra, the employer and the union were parties to a collective-bargaining agreement covering a unit which included licensed practical nurses (LPNs). Shortly after the Union demanded that certain LPNs be terminated for nonpayment of dues, the employer promoted them to a new position of LPN supervisor and insisted they were no longer in the unit. The LPN supervisors continued to perform the work they had done as unit LPNs, although they were assigned additional supervisory responsibilities. In agreeing with the judge that the employer's actions violated Section 8(a)(5), the Board characterized the change as a transfer of work from the bargaining unit. The Board disagreed with the judge's analysis that the employer changed the scope of the unit because not all LPNs were promoted to the new position. In finding a violation, the Board recognized, as Respondent here argues, that neither the decision to create new supervisory positions nor the selection of individuals to fill them were mandatory subjects of bargaining. Even assuming that the LPN supervisors were statutory supervisors, the Board found that the critical fact was that they continued to perform unit work. Thus, the Board held that, where the new supervisor continues to perform former bargaining unit work, an employer must bargain before removing work from the unit. Accord: *Legal Aid Bureau,* 319 NLRB 159 (1995); *Fry Foods,* 241 NLRB 76, 88 (1979); and cases cited therein. Cf. *Bridgeport & Port Jefferson Steamboat Co.,* 313 NLRB 542, 545 (1993) (Board found respondent in fact bargained in good faith to impasse before implementing promotion of unit captains to supervisors which resulted in transfer of work from the unit).

Respondent's argument that the sous chefs were never in the unit and that the work they performed was never unit work ignores the fact that the parties had arbitrated the issue of their unit status and had received a determination of that issue at the time Respondent took the actions affecting the sous chefs. The arbitrator's decision regarding the unit status of sous chefs was a product of the parties' consent as expressed in the collective-bargaining agreement's arbitration clause and the provisions regarding monitoring of compliance with the recognition clause. Having bargained for this procedure, Respondent could not ignore its results. Although the Board is not required to defer to the arbitration award, Respondent had agreed to be bound by the arbitrator's determination and the arbitrator had clearly found that the sous chef position was a unit position on December 14, 1994. Notwithstanding dicta in the arbitrator's decision regarding what Respondent could theoretically do if a unit employee "began to perform functions that gave them supervisory status," the sous chefs were unit employees when Respondent acted unilaterally to reclassify that position to the nonunit ACM position.

Respondent's reliance on cases upholding an employer's right to create *new* supervisory positions and to promote unit employees into those positions is misplaced because Respondent's own witnesses testified and its records established that Respondent did not create a new position but reclassified or "re-evaluate[d] an existing position." In fact, Hogarty did not follow Respondent's established procedure for adding a new position to a department's table of organization and did not post the ACM position for bidding by employees. As a result of Respondent's changes, all three individuals who were sous chefs at the time of the arbitration award automatically became ACMs. Although a bargaining unit "sous chef" position was posted, this was not the same position that the arbitrator had before him. The unit sous chef was limited to working the a.m. shift, cooking only breakfast and lunch, did not have any role in creating nightly specials or new items for the menu and, most importantly, was paid considerably less than the former sous chefs.

As the General Counsel acknowledges, and the Board itself has recognized, it is sometimes difficult to determine whether a change affecting a classification of unit employees is an alteration in the scope of the unit or a transfer of unit work. See *Antelope Valley Press,* 311 NLRB 459 (1993). See also *Hill-Rom Co. v. NLRB,* supra, 957 F.2d at 457. Having considered the evidence in the record and the arguments of the parties, I conclude that the Board's decision in *Holy Cross Hospital,* supra, governs the instant case. As noted above, the sous chef position was included in the unit by "consent" of the parties. Moreover, Respondent effectively eliminated that position when it reclassified all three employees occupying the position to supervisors while having the employees continue to perform essentially the same work they had previously performed. The unit "sous chef" position that Respondent posted and filled more than a month later was not the same position. By "re-classifying" an existing unit position in order to remove it from the bargaining unit, Respondent altered the scope of the unit. Since it is undisputed that the Union was never consulted regarding this reclassification, it would follow that Respondent violated the Act, unless the Union had previously agreed in the contract to such an alteration in the unit.

Assuming arguendo that Respondent did not alter the unit by reclassifying the sous chefs to ACMs, it clearly transferred the work of the sous chefs out of the unit because there is no dispute that the ACMs continued to spend the majority of their time in the same food preparation tasks they had performed as sous chefs. Moreover, instead of three unit employees performing these tasks, there was now only one. Contrary to Respondent's argument, the changes implemented in January did have a significant impact on the unit even if Respondent had legitimately promoted the incumbent sous chefs to supervisory positions. Because the transfer of work from the bargaining unit is a mandatory subject of bargaining and because there is no dispute that Respondent did not bargain before implementing the "promotion" of sous chefs to ACMs, a finding of a violation would likewise follow, absent proof that the Union had waived its right to bargain about the transfer of work from the unit.

H. Waiver

Respondent argues that the management-rights clause in the collective-bargaining agreement between the League and the Union expressly reserves to Respondent the exclusive right to discontinue, reorganize, or combine any operation, even if the effect is a reduction in unit work or the number of unit employees. According to Respondent, this right encompasses the right to create and

fill new job classifications and alter or eliminate old classifications. Respondent also cites article X, section 9 as limiting the Union's right to file a grievance in situations where Respondent creates and alters job classifications. Under this provision, the Union can not challenge the content or description of a job, only the wage rate assigned by Respondent. Respondent further relies on new contractual provisions and the bargaining history which preceded their inclusion in the collective-bargaining agreement to support its contention that the Union agreed, during 1992 negotiations, that any dispute regarding unit placement of newly created positions would be resolved exclusively through the grievance/arbitration provisions of the agreement, in essence waiving its right to file unfair labor practice charges with the Board. Respondent argues that these provisions, and the absence of any contractual restriction on supervisors performing unit work, also amount to a waiver of any right the Union had to prior notice and bargaining regarding transfer of work out of the unit.

The management-rights clause, article XXVII, section 1 provides as follows:

> Except as in this agreement otherwise provided, the Employer retains the exclusive right to hire, direct and schedule the working force; to plan, direct and control operations, to discontinue, subject to the provisions of Paragraph 3 of thisarticle,[21] or reorganize or combine any department or branch of operations with any consequent reduction or other changes in the working force; to hire and lay off Employees; to promulgate rules and regulations; to introduce new or improved methods or facilities regardless of whether or not the same cause a reduction in the working force and in all respects to carry out, in addition, the ordinary and customary functions of management. None of these rights will be exercised in a capricious or arbitrary manner.

The 1992 negotiations added a new section 4 to the management-rights clause entitled "Monitoring and Enforcement of Recognition and Subcontracting Provisions," which, inter alia, required the Employer to disclose certain information to the Union on a semiannual basis. Specifically, the Employer was required to provide:

> [A] report including the name, date of hire and job title for all non-union positions below supervisor which were created since July 1, 1984 in departments where bargaining unit work is performed. The first report, due October 15, 1992, was to include job descriptions for all such positions, and subsequent reports would include any job description which had been changed from the prior reporting period.
>
> [A] departmental count of the number of supervisory staff who supervise bargaining unit positions.
>
> [A] staffing/payroll report by department including the name, social security number, date of hire, salary and hours worked for all unit employees, including part-timers working 1/5 or less the regular schedule, temporary or contingent workers.

The Employer was also required to provide subcontracting information annually. The contract specifically provided that submission of the above information was not to be deemed an admission or agreement that the Union represented any of the nonunit positions and that "criteria which shall determine whether a position is in the bargaining unit include, but are not limited to, if the Employee performs bargaining unit work and if these duties include legitimate supervisory functions." Finally, the parties agreed to meet to discuss the contents of the reports and further agreed that any disputes arising about whether an employee in a nonunit position should be covered by the collective-bargaining agreement, or whether work was being subcontracted in violation of the contract, or whether the recognition clause was being violated shall be submitted simultaneously to the expedited mediation/arbitration procedures set forth in the contract and to the 1199/League labor management committee.

The expedited mediation/arbitration procedures, article XXXI(A), were also agreed to as part of the 1992 negotiations. This process was intended to be available to "assist in the disposition of disciplinary disputes and cases of contract application concerning fact oriented issues, but not to disputes involving contract interpretations which have League-wide ramifications. The latter will be presented to the '1199/League Labor Management Committee.'" Either party could request submission of a grievance to these procedures at third step of the existing grievance procedure.

Respondent also cited article X, section 9, included in the articles on wages, which reads as follows:

> If it is claimed by the Union that the Employer has instituted a new job classification or substantially modified an existing job classification, the Union may process a claim for a change in the job rate for such classification in accordance with the provisions of article XXXI and XXXII of this agreement, provided, however, that it is expressly understood and agreed that neither the Union nor any employee may grieve or arbitrate with respect to the content or description of such job or classification.

As noted above, on September 17, 1994, the parties agreed to extend the 1992 agreement through June 30, 1998, with modifications. Included in these modifications was the following provision regarding combining and restructuring jobs:

> Each institution shall give the Union thirty (30) days notice in writing of its intention to combine jobs, to restructure existing jobs or to create new classifications. The Union may request a meeting to discuss the employer's proposal including the proposed wage rate. If the parties disagree about job content or wage rates, the Employer and Union may invoke a facilitation process (as provided in article 6 (h)). If there is disagreement on the proposed rate, the Union may submit the issue to arbitration. In no event shall this procedure delay implementation of the employer's proposal.

The 1994 agreement also included modifications to the wage, benefits, and job security provisions of the 1992 collective-bargaining agreement and established various joint labor/management committees to facilitate the concept of partnership.

Respondent offered the testimony of the president of the League, Bruce McIver, and one of its attorneys, Marc Kramer, regarding the 1992 negotiations and the inclusion in the contract of the new provisions referred to above. No testimony was offered regarding the 1994 negotiations. According to these witnesses, the Union's major theme in 1992 negotiations was job security and "maintaining the integrity of the bargaining unit." Kramer testified that Debbie King, the Union's executive vice president and negotiator, expressed the Union's concern that League members were eroding the bargaining unit by, inter alia,

[21] Par. 3 is the subcontracting provision of the collective-bargaining agreement.

creating new nonunit positions to perform unit work. To meet these concerns, the Union proposed restrictions on performance of unit work by nonunit employees, use of agency employees, and subcontracting; regular disclosure of information about nonunit positions in the hospitals; and an expedited grievance/arbitration procedure to resolve unit placement issues if they arose during the term of the contract. The League initially opposed these provisions, but after intense negotiations, reached agreement with the Union on changes in the recognition clause addressing agency and part-time employees, an expedited grievance/arbitration procedure with the addition of a mediation step before arbitration and the language which can be found at article XXVII, section 4 dealing with disclosure of information regarding nonunit positions. The Union ultimately dropped its proposal for contractual restrictions on supervisors doing bargaining unit work. McIver testified that the League had rejected this proposal because of a practice among League members to have supervisors perform unit work in a variety of situations and a desire among the members not to be constrained by the contract in this regard. According to McIver, the League agreed to the monitoring and expedited arbitration provisions because of a willingness to address the Union's concerns that many "supervisory" job descriptions were really a fiction to keep employees out of the unit. Kramer also testified that, although there is no contractual restriction on supervisors performing unit work, "it is clear in the collective-bargaining agreement about the Union's right to review supervisors and whether they are supervisors or just regular old employees covered by the collective-bargaining agreement."

Much of the discussion which preceded agreement on these issues took place in a subcommittee of the parties full negotiating committees. The Union had proposed that negotiations regarding these subjects be treated as nonprecedential, meaning that neither party could use statements or proposals made during such negotiations against the other party in any future proceedings, including arbitrations and NLRB proceedings. Respondent's witnesses denied they agreed to this proposal and there is no written agreement to that effect. However, the Union's proposal for "nonprecedential" bargaining contains a footnote stating that the parties had agreed to conduct negotiations on these topics on such a basis and there is no evidence that any representative of the League objected to the wording of the footnote. Moreover, Kramer's denial that the subcommittee dealing with these issues had been called the nonprecedential subcommittee was contradicted by his own notes of bargaining sessions of that subcommittee. Kramer labeled these meetings in his notes, "non-precedential meeting."

The Charging Party offered the testimony of King and its labor counsel, Richard Levy, who agreed with Respondent's witnesses that job security was a major issue for the Union during the 1992 negotiations. Levy, who drafted the Union's proposals, testified that the purpose of proposing a nonprecedential subcommittee to discuss certain topics was to facilitate open and frank discussion of topics where each side believed it had substantial contract rights already without fear that the other side would use these discussions against them in the future to support a claim of waiver. Levy and King testified that McIver agreed to this procedure, although they conceded that that agreement was not reduced to writing. According to Levy, one of the topics discussed in the nonprecedential subcommittee was the Union's proposal limiting performance of unit work by supervisors. Levy testified that the Union had won arbitrations on this issue but wanted to codify this limitation in the collective-bargaining agreement to prevent ongoing disputes in this area. Levy conceded that the League opposed an explicit limitation in the contract and the Union ultimately dropped the proposal. Levy testified that the parties agreed to maintain the status quo on this issue, i.e., the Union would continue to assert that the contract did not allow supervisors to perform unit work and would challenge such instances through the grievance procedure, as they had done in the past. In support of this testimony, the Charging Party offered into evidence an arbitration award dated March 29, 1996, upholding such a grievance filed by the Union against another League member. Levy and King testified that the purpose of the monitoring and enforcement provisions in article XXVII, section 4 was to ensure the Union was aware of unit placement issues early enough to resolve them through discussions with management. Levy and King denied that there was any discussion suggesting that this was the only information the Union would be entitled to during the term of the contract. In this regard, McIver himself testified that nothing in the collective-bargaining agreement expressly provides that the information identified in article XXVII, section 4 is the only information that the Union is entitled to. According to McIver, "they're entitled to all kinds of information."[22]

It is well established that a waiver of statutory bargaining rights must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). The Board, in applying this test, has held that a contract clause must specifically include the subject at issue and that bargaining history must show that the matter at issue was fully discussed and consciously explored during negotiations and that the Union consciously yielded or clearly and unmistakably waived its interest in the subject matter before a waiver will be found. *Johnson-Bateman Co.,* 295 NLRB 180, 184–188 (1989), and cases cited therein. Accord: *Bozeman Deaconess Hospital,* 322 NLRB 1107 (1997); and *Postal Service,* 306 NLRB 640, 642–643 (1992), enf. denied 8 F.3d 832 (D.C. Cir. 1993).[23]

In *American Stores Packing Co.,* 277 NLRB 1656 (1986), cited by Respondent, the Board found a waiver of the union's right to bargain regarding the employer's decision to close its plant and remove all work from the bargaining unit in the plain meaning of a letter of intent, by which the following phrase was included in the management-rights clause:

> [T]o determine whether and to what extent work required in its business shall be performed by employees covered by the collective-bargaining agreement

Similarly, the Board found in another case relied on by Respondent that the union waived its right to bargain over changes in an employer's absenteeism policy by agreeing to dismissal and management rights clauses in which the employer retained the right to discipline employees for neglect of duty and by the union's failure

[22] On redirect, McIver for the first time testified to a conversation with King in which he claims to have specifically asked her: "[D]oes the fact that you want all this information and monitoring system expressed in the contract mean that you're going to deal with these as contractual issues . . . because, if you're not, I'm not going to do it" and that King replied: "We understand that. We want it . . . that's why we're putting it in the contract. That's why we want it in the agreement." I do not credit McIver regarding this conversation. If in fact such a conversation had occurred, Respondent would have brought it out on direct examination, rather than waiting until after the Union had made a point on cross-examination.

[23] The Board has thus far declined to apply the D.C. Circuit's less rigid "contract coverage" test when determining whether contract language may be invoked as a defense to an alleged failure to bargain over changes in mandatory subjects. *Edgar P. Benjamin Healthcare Center,* 322 NLRB 750 (1996), and cases cited therein.

to challenge the unilateral nature of numerous previous revisions in the employer's policies. *Emery Enterprises,* 268 NLRB 824 (1984). These cases are distinguishable.

None of the contractual provisions cited by Respondent establish, on their face, prior union consent to the actions taken by Respondent, nor a waiver of the Union's right to advance notice and an opportunity to bargain about such actions. The management-rights clause does not specifically address the subject at issue here, whether characterized as the reevaluation/reclassification of a unit position to remove it from the unit or a transfer of work from unit employees to nonunit employees. Although Respondent is correct that Respondent has retained the right to "discontinue . . . reorganize or combine any department or branch of operations," that is not what it did here. The 11 west private unit continued to exist and function as it previously did. There was no change in the organizational structure of the unit as shown on the PAQs. The promotion of the department head (Hogarty) and any assignment of additional catering duties to the department manager (Narduli) clearly did not represent a reorganization or combination of departments or branches of operation.[24] None of the other enumerated rights retained by Respondent clearly cover the changes implemented by Respondent.

The new monitoring and enforcement provisions added to the management-rights clause in 1992 do address the subject of nonunit positions being created to erode the bargaining unit. However, these provisions merely establish a procedure for the Union to investigate such claims and enforce them through the contract. They do not, on their face, give prior consent to the employer members of the League to create or modify nonunit positions where such actions may have an impact on unit work and unit employees. On the contrary, they evidence the Union's continuing interest in the subject of nonunit classifications performing unit work which may erode or diminish the unit during the term of the contract.

Any limit on the Union's right to grieve job content or description under the contract's wage provision (art. X, sec. 9) would apply, on its face, only to the creation or modification of *unit* classifications which remain in the unit because, as I'm sure Respondent will agree, the Union has no right to process a claim under the contract for a change in the job rate of a newly created or modified nonunit position. Thus, this provision has no application to the facts in this case, even under Respondent's version of them. In any event, article X, section 9 was apparently modified by the September 1994 agreement which required League employers to give the Union 30 days advance notice before restructuring existing jobs or creating new unit classifications with an opportunity to discuss, among other things, job content. This hardly establishes a waiver or relinquishment of the Union's interest, for the term of the contract, in the content or pay rate of unit classifications.

Moreover, the testimony and documents offered by Respondent to show bargaining history do not establish either consent or a clear and unmistakable waiver. On the contrary, they show the Union's reservation of its right to challenge the creation of putatively nonunit supervisory positions where those positions have a potential impact on the bargaining unit. As Kramer, a member of the League's negotiating committee admitted, "[I]t is clear in the collective-bargaining agreement about the union's right to review supervisors and whether they are supervisors or just regular old employees covered by the collective-bargaining agreement." Thus, the successful negotiation of contractual provisions to monitor and enforce the recognition clause can hardly be interpreted as a conscious relinquishment of the right to bargain about either removal of classifications from the unit or transfer of work from unit to nonunit employees. Similarly, the Union's abandonment of its proposed contractual restrictions on supervisors performing unit work, in light of inclusion of article XXVII, section 4, does not prove either prior consent to Respondent's January actions regarding the sous chefs, nor waiver of the Union's right to bargain about these changes. In fact, arbitration awards under the 1992 agreement have upheld the Union's position that the regular assignment of unit work to supervisory employees violates the collective-bargaining agreement, notwithstanding the absence of an explicit contractual limitation.

Respondent further asserts that the Union waived its right to the information requested at the January 19 meeting by agreeing to article XXVII, section 4, the monitoring and enforcement provisions of the contract. Respondent argues that, because the Union initially proposed language seeking more information than that enumerated in the final agreement, it gave up its right to seek, during the term of the agreement, any other information on the subject of unit placement of disputed nonunit classifications. Respondent's argument is contradicted by its own witness, McIver, who served as the League's chief spokesman during the 1992 negotiations. McIver admitted that nothing in the collective-bargaining agreement expressly provides that the information identified in article XXVII, section 4 is the only information the Union is entitled to, and that, in fact, "the Union is entitled to all kinds of information." This is consistent with Board precedent holding that a contract provision requiring an employer to provide certain information to a union will not be found to waive a union's statutory right to other information, unless such a waiver is expressly stated in the agreement. *Gannett Co.,* 305 NLRB 906 (1991); *Bozzuto's, Inc.,* 275 NLRB 353 (1985); *General Dynamics Corp.,* 268 NLRB 1432 fn. 2 (1984); and *General Electric Co.,* 173 NLRB 164 (1968). Cf. *United Technologies Corp.,* 274 NLRB 504, 507 (1985).

Finally, I find that the inclusion of article XXVII, section 4 in the contract during the 1992 negotiations did not constitute a waiver of the Union's right to pursue a remedy before the NLRB over a League member's unilateral removal of unit classifications or unit work. Although the parties agreed through this language to share information regarding disputed nonunit positions and discuss unit placement issues, with any unresolved disputes being subject to resolution through the mediation and arbitration provisions, nothing in the collective-bargaining agreement expressly provides that the Union has given up its right of access to the Board's remedial procedures. Nor does the history of negotiations preceding agreement on this provision establish such a waiver. The Board applies the same "clear and unmistakable" standard to determine whether a party has waived its right to file charges or petitions with the Board. See *Queen of the Valley Hospital,* 316 NLRB 721 (1995). That test is not met here.

In reaching this conclusion, I am mindful of the Board's policy of encouraging alternative dispute resolution. However, in the instant case, the Union did attempt to resolve its dispute over unit placement of sous chefs through the contractual procedures, only to find that the result it achieved there was ephemeral. Accordingly, Respondent's unilateral reclassification of sous chefs to nonunit ACMs, and its refusal to furnish the Union with requested

[24] I have already found that these changes were not the cause of the reevaluation of the sous chef position. In any event, Respondent never attempted to show that its January actions somehow combined the 11 west and catering departments.

information which was relevant and necessary to the Union's investigation of this change, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Union is the exclusive collective-bargaining representative of an appropriate unit of Respondent's service and maintenance employees, including sous chefs, but excluding statutory supervisors and others as specifically enumerated in article I of the collective-bargaining agreement between the League and the Union which is effective through June 30, 1998.

3. By unilaterally reclassifying employees in the unit position of sous chef to the nonunit position of ACM and transferring the work of the employees out of the bargaining unit, Respondent has altered the scope of the unit without the Union's consent and has failed and refused to bargain in good faith with the Union regarding the transfer of work from the unit in violation of Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to furnish the Union, upon request, with the wage rates and job descriptions of the job classifications of sous chef and ACM, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In order to restore the status quo ante, Respondent shall be required to rescind the January 10, 1995, "re-evaluation" and consequent reclassification of the sous chef job classification to ACM, recognize the Union as the exclusive collective-bargaining representative of the employees occupying the ACM position and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment. Respondent shall be required to apply the terms of the existing collective-bargaining agreement between the Union and the League to employees occupying the ACM position in the absence of agreement to the contrary. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment which may have been afforded to the ACMs as compared to the wages, benefits and terms or conditions of employment of bargaining unit employees.

Furthermore, Respondent shall be ordered to notify and, upon request, bargain in good faith with the Union before transferring any work from unit employees to nonunit employees. Although it does not appear from the record before me that any employees suffered economic loss by reason of Respondent's actions, I shall order Respondent to make whole unit employees if it can be shown that they have suffered any loss of wages and benefits as a result of Respondent's unlawful actions. Backpay, if there is any, shall be computed in the manner prescribed in *Ogle Protection Service,* 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). To the extent, if any, that sous chefs/ACMs lost coverage for various benefits provided under the collective-bargaining agreement, I shall order Respondent to reimburse them for any expenses incurred as a result of their noncoverage, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Finally, Respondent will be ordered to provide all information the Union requested at the January 19, 1995 meeting, to the extent the Respondent has not already done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Mt. Sinai Hospital, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Excluding assistant culinary managers who perform the work of sous chefs from the service and maintenance bargaining unit represented by 1199, National Health and Human Service Employees Union without the consent of the Union.

(b) Failing and refusing to recognize the Union as the exclusive collective-bargaining representative of employees occupying the position of sous chef/assistant culinary manager and failing to apply the terms of the existing collective-bargaining agreement to those employees.

(c) Transferring work from unit employees to nonunit employees without first affording the Union notice and an opportunity to bargain regarding such transfers.

(d) Failing and refusing to provide information to the Union, upon request, which is relevant and necessary to the performance of its functions as the exclusive collective-bargaining representative of the employees in the unit.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the January 10, 1995 "re-evaluation" and consequent reclassification of the sous chef job classification to assistant culinary manager (ACM).

(b) Recognize the Union as the exclusive collective-bargaining representative of the employees occupying the ACM position and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

(c) Apply the terms of the existing collective-bargaining agreement between the Union and the League to employees occupying the ACM position, in the absence of agreement to the contrary. However, nothing herein shall be construed to authorize or require the withdrawal or elimination of any wage increase or other improved benefits or terms or conditions of employment which may have been afforded to the ACMs as compared to the wages, benefits, and terms, or conditions of employment of bargaining unit employees.

(d) Notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees.

(e) Make whole, in the manner described in the remedy portion of this decision, any unit employees for any loss of wages and benefits they may have suffered as a result of Respondent's unlawful actions and, to the extent that sous chefs/ACMs lost coverage for various benefits provided under the collective-

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining agreement, reimburse them for any expenses incurred as a result of their noncoverage.

(f) Provide all information the Union requested at the January 19, 1995 meeting, to the extent the Respondent has not already done so.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of any backpay which may be due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any time since February 15, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT exclude assistant culinary managers who perform the work of sous chefs from the service and maintenance bargaining unit represented by 1199, National Health and Human Service Employees Union without the consent of the Union.

WE WILL NOT fail and refuse to recognize the Union as the exclusive collective-bargaining representative of employees occupying the position of sous chef/assistant culinary manager and WE WILL NOT fail and refuse to apply the terms of the existing collective-bargaining agreement to those employees.

WE WILL NOT transfer work from unit employees to nonunit employees without first affording the Union notice and an opportunity to bargain regarding such transfers.

WE WILL NOT fail and refuse to provide information to the Union, upon request, which is relevant and necessary to the performance of its functions as the exclusive collective bargaining representative of the employees in the unit.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the January 10, 1995, "re-evaluation" and consequent reclassification of the sous chef job classification to assistant culinary manager (ACM).

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees occupying the ACM position and, upon request, bargain with the Union regarding those employees' wages, hours, and other terms and conditions of employment.

WE WILL apply the terms of the existing collective-bargaining agreement between the Union and the League of Voluntary Hospitals and Homes of New York to employees occupying the ACM position, in the absence of agreement to the contrary. However, the Board has not authorized or required us to withdraw or eliminate any wage increase or other improved benefits or terms or conditions of employment which may have been afforded to the ACMs as compared to the wages, benefits, and terms, or conditions of employment of bargaining unit employees.

WE WILL notify and, upon request, bargain with the Union in good faith before transferring any work from unit employees to nonunit employees.

WE WILL make whole any unit employees for any loss of wages and benefits they may have suffered as a result of our unlawful actions and, to the extent the sous chefs/ACMs lost coverage for various benefits provided under the collective-bargaining agreement, WE WILL reimburse them for any expenses incurred as a result of their noncoverage.

WE WILL provide all information the Union requested at the January 19, 1995 meeting, to the extent we have not already done so.

MT. SINAI HOSPITAL

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."